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Ontario Labour Relations Board HIGHLIGHTS

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in May of this year. These decisions will appear in the May/June issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Bargaining Unit – Certification – Construction Industry – The applicant sought a bargaining unit of bricklayers and stonemasons in one geographic area – The responding party disagreed with the proposed bargaining unit and asserted the appropriate unit should include all unrepresented trades because the applicant is not an affiliated bargaining agent nor an employee bargaining agency – The responding party also submitted that the applicant could not hold itself out as a craft unit since it has previously sought and gained representation rights for other trades – The Board held that there was nothing in s. 9(3) of the Act that requires a craft trade union to represent such employees exclusively, and its representation of other trades in no way diminishes its status as a craft unit - The determination of the scope of the bargaining unit was left to the panel conducting the case management hearing – Matter continues

1412768 ONTARI LTD. O/A CENTRAL CONSTRUCTION; RE: Brick and Allied Craft Union of Canada; OLRB File No. 0167-14-R; Dated May 2, 2014; Panel: Harry Freedman (6 pages)

Construction Industry – Delay – Standing – Unfair Labour Practice –The Carpenters alleged that the Labourers and Hayman violated sections 140 and 162(2) of the Act by entering into an arrangement whereby the Labourers illegally represent carpenters employed by Hayman in the ICI sector of the construction industry – The Labourers and Hayman made four preliminary objections (abuse of process, lack of standing, delay, and lack of a labour relations purpose) requesting that the Board dismiss the complaint without a hearing – First, the Labourers claimed that the application was an abuse of process as it was a repeat of a Board file previously dismissed – The Board found that abuse of process did not apply since the previous decision had expressly contemplated the Carpenters bringing another application – Second, the Labourers claimed that the Carpenters lacked standing because the outcome of the application would not affect a legal right of the Carpenters – The Board agreed, in part, and dismissed the Carpenters' claim under section 140, finding that the Carpenters had no standing to allege such a violation given that they are a stranger to the accreditation relationship between the Form Work Council of Ontario and the Ontario Form Work Association – The Carpenters however did have standing to proceed with the section 162(2) complaint, as they are a party to a collective agreement applicable to ICI carpentry work in Ontario and as such can access the policing mechanism which protects the integrity of that collective agreement – Third, the Board accepted the objections concerning undue delay and the absence of a labour relations purpose and exercised its discretion not to inquire into the complaint – The Carpenters had not had a collective agreement or bargaining rights for Hayman's carpenters since 2010 – Moreover, they

neither sought reconsideration of the Board's 2010 decision terminating their bargaining rights nor filed a certification application in respect of the affected employees in the 2013 open period or at any other time – The only explanation for the delay was the Carpenters' claim that they learned of the alleged illegal arrangements through remarks made in the 2013 open period – The three year period of delay put this case into the range of "extreme delay" where the Board will customarily exercise its discretion against inquiring into a complaint – The Board will not permit the Carpenters to use a ULP complaint to regain representation rights they could not achieve through the certification process – Application dismissed

HAYMAN CONSTRUCTION INC.; RE: Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America; RE: Labourers' International Union of North America, Local 1059; OLRB File No. 1161-13-U; Dated May 22, 2014; Panel: Jack J. Slaughter (12 pages)

Jurisdictional Dispute – In two work assignment disputes involving the installation of metal mesh panels and handrails mostly below an existing conveyor system, the two employers assigned the work in dispute to the Millwrights – The Iron Workers said most of it should have been done with a composite crew, except for the handrails, which they should have done exclusively - The work in dispute was the subject of a Project Agreement as defined by section 163.1 of the Act – The Iron Workers did not have ICI bargaining rights with respect to the contractor that performed the work in the absence of that Project Agreement – The Millwrights and the employer argued that the rights held by the Iron Workers were not as strong because they were "indirectly" created by the Project Agreement, and should be discounted accordingly – The Board disagreed, holding that the bargaining rights secured by way of the Project Agreement were of equal quality to the Millwrights bargaining rights for the purposes of the JD – In an almost identical case to both of these decided a year ago, the Millwrights pulled their claim for all of the work during the course of the consultation, effectively accepting the composite crew assignment that had been made - A question arose as to the weight to be given to that work assignment for the purpose of the present proceedings – The Board concluded that it was practice evidence that ought to be given normal weight, like all other established practice evidence - Ultimately, the Board determined that most of the work in dispute should have been performed by an equally-weighted composite crew (i.e. as argued by the Iron Workers), except for the handrail, which should have been performed by members of the Iron Workers, exclusively – Declarations made

INDUSTRIAL TRADE SOLUTIONS; THE STATE GROUP INC.; RE: International Association of Bridge, Structural and Ornamental Ironworkers, Local 736; RE: United Brotherhood of Carpenters and Joiners of America, Millwrights Local 1916; OLRB File No. 0426-13-JD & 0430-13-JD; Dated May 12, 2014; Panel: Lee Shouldice (31 pages)

Construction Industry – Related Employer – Sale of a Business – The Union argued that Mr. Coulombe was a key person at both Carlington and Clearwater – In January 2006, Clearwater hired an estimator and in June 2006, Mr. Coulombe left Clearwater and worked elsewhere as an estimator for about three years – Clearwater successfully carried on business after Mr. Coulombe's departure – Mr. Coulombe is currently the President of Carlington and holds 50% of its shares – Carlington became active in the performance of bridge work in April 2009 – The Board held that there was a transfer of business from Clearwater to Carlington – Mr. Coulombe played a key role in Clearwater's business until his departure in 2006 – His one-third ownership interest in the company coupled with his titles as director and Vice-President were significant facts – His estimating and project management duties were two functions that together constituted a large portion of what makes a contracting business work – Mr. Coulombe is clearly a key person at Carlington – Carlington and Clearwater carry on the same business and bid the same contracts – The skills, capacity, and experience of the principals of a construction business are often what defines the business – When there is more than one person who personifies the first business, the consequence of the departure of an alleged "key individual" is significant – The first business need not be destroyed to find that there has been a sale – Clearwater's continued growth only means that it survived the loss of Mr. Coulombe – Carlington's quick success illustrates that Mr. Coulombe honed his craft at Clearwater – There is no magic time limit within which a subsequent business must be established for the Board to find a sale of business or related employer – The three year hiatus between Mr. Coulombe's involvement in the two companies is not significant as there was no

difficulty in establishing Carlington – The Board dismissed the applications against Ganawa, for, among other things, Ganawa and Clearwater carry on different types of businesses – Allowed in part, dismissed in part

THE GANAWA COMPANY LTD., CARLINGON CONSTRUCTION INC., CLEARWATER STRUCTURES INC.; RE: Labourers' Internationals Union of North America, Ontario Provincial District Council; OLRB File No. 1359-10-R; Dated May 12, 2014; Panel: David A. McKee (19 pages)

***Hospital Labour Disputes Arbitration Act* – Termination – Timeliness** – The applicant applied to terminate the union's bargaining rights on February 27, 2014 and the union took the position the application was untimely – The previous two-year collective agreement ended on April 30, 2012; on March 5, 2012 the union gave notice to bargain and eleven days later a conciliation officer was appointed – On May 23, 2013 the Ministry gave notice that the conciliation officer was unable to effect a collective agreement; in February and March 2014 the union and employer scheduled further negotiations, but were unable to reach agreement and on March 6, 2014 the union informed the Employer of its intention to apply for interest arbitration – First, the Board found it was untimely pursuant to s. 12(2) of *HLDDA*: once a conciliation officer has been appointed, an application for termination cannot be brought until after the interest arbitration process has resulted in a collective agreement – The Board then considered whether in the circumstances it could exercise its discretion to declare the application untimely pursuant to *Signature Contractors* and those cases that have followed it – First the Board distinguished *Signature Contractors* by noting that conciliation had not continued indefinitely, since the Minister had in fact notified the parties in May 2013 that the conciliation officer was unsuccessful in his efforts – Second, the Board noted that *HLDAA* is a unique statute, designed to ensure that the parties must ultimately have a collective agreement, and that it is designed not only to eliminate the ultimate sanctions of a strike or lockout during this process but also to minimize interruptions to the process of reaching a collective agreement – Third, the Board noted that in the face of a clear statutory provision such as subsection 10(12), which contemplates an open period arising when a collective agreement is entered into after its expiry, there is no basis for the Board to read in the type of notional open period urged by the applicants, and that to do so would be inconsistent with *HLDAA* and would render ss. 10(12) superfluous – Finally the Board found it would be inappropriate to apply *Signature Contractors* given that *HLDAA* contemplates and addresses this situation – Application dismissed as untimely

UNITED FOOD AND COMMERCIAL WORKERS CANADA (UFCW), LOCAL 175.; RE: Annette Walker, Brien Wilson; OLRB File No. 3288-13-R; Dated April 30, 2014; Panel: Roslyn McGilvery (12 pages)

Certification – Construction Industry – Practice and Procedure – When the Labourers proposed to add five names to the list of employees named in the employer's Schedule A, the union provided only the employees' first names, arguing they did so to protect the employees' identity – The employer objected to the union's stance, pleading prejudice in its inability to correctly identify the employees and ascertain what work they were performing on the application date (and, arguably, for whom) – The Board rejected the union's position, holding that an employer should not have to deduce the identity of employees from a mere description of their workplace activity – The Board also held that, notwithstanding its policy that a party asserting an individual should be on the list of employees bears the onus of establishing that fact, where the employer may have better insight into the facts of the workplace status of the individuals, the employer should adduce its evidence first – Matter continues

STERWYN LIMITED AND STERWYN CONTRACTING LIMITED; RE: Labourers' International Union of North America, Ontario Provincial District Council; OLRB File No. 3607-13-R; Dated May 15, 2014; Panel: Bernard Fishbein (13 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
PCL Constructors Canada Inc. Court No. 240/14	3414-11-G	Pending
Avis Installation Inc. Court No. 226/14	1766-13-R	Pending
Bogdan Koscik Court No. DC-14-000636-00JR	0956-13-U	Pending
John Harrison Court No. 189/14	1375-13-U	Pending
Mary McCabe Court File No.14-2012 **(Ottawa)**	2737-12-U	Pending
Rail Cantech Court No. 169/14	2661-13-R	Abandoned
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	Pending
Richtree Markets Inc. Divisional Court No. 31/14	1768-13-U	Pending
2218783 Ontario Inc. Divisional Court No. 13-DV-0133 **(Brampton)**	2872-12-ES	Pending
Jefferson Mendonca Divisional Court No. 478/13	2146-10-U 0006-13-R	June 26, 2014
Neivex et al. Divisional Court No. 416/13	0441-13-R	Pending
Merc Electrical Limited Divisional Court No. 437/13	0452-13-G	Pending
Sysco Fine Meats of Toronto a division of Sysco Canada Inc Divisional Court No. 414/13	3484-11-R	October 28, 2014
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Gate Gourmet Canada Inc. Divisional Court No. 276/13	3688-11-U	June 12, 2014

Biggs & Narciso Construction Services Inc. Divisional Court No. 181/13 M43574	1307-10-R	LIUNA Seeking Leave to CA
Weihua Shi Divisional Court No. 158/13 M35837	0273-10-ES	Seeking Leave to SCC
Durval Terciera, et al Court of Appeal No. C 58059 & C58146	1475-11-U	September 11, 2014 (Court of Appeal)
EllisDon Corporation Court of Appeal C58371	0784-05-G	October 8, 2014 Court of Appeal
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11 **(London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above